



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 2, 2003

Mr. John Smith
District Attorney
Ector County
300 North Grant, Room 305
Odessa, Texas 79761

OR2003-6136

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186891.

Ector County Judge Jerry Caddel (the "Judge") received a request for "the county insurance enrollment dates for Former County Commissioner Tom Todd and his wife, Connie Todd" as well as "the amount paid out in claims to Tom Todd and his wife, Connie Todd and any claims paid out (to Health Care Providers) for Tom Todd and his wife, Connie Todd." You have submitted to this office information that shows that the judge informed the requestor of when the commissioner and his wife were enrolled in the county insurance plan. You assert that the requested claim information is confidential under the Texas Medical Privacy Act and the Standards for Privacy of Individually Identifiable Health Information ("the Privacy Rule"), 45 C.F.R. Parts 160 and 164, which was adopted by the United States Department of Health and Human Services, Office for Civil Rights, to implement the requirements of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191 ("HIPAA"). On August 18, 2003, pursuant to section 552.303 of the Government Code, this office asked that Ector County provide this office additional information concerning its claims under HIPAA. *See* Gov't Code § 552.303. Ector County timely provided this additional information to this office. We have considered your claims and reviewed the submitted information, which you say is a representative sample of the

requested information.¹ We have also considered the requestor's comments. *See* Gov't Code § 552.304.

We begin with the requestor's suggestion that the requested information is subject to section 552.022(a)(3) of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. Documents that fit into one of the categories of section 552.022 must be released under that provision unless the information is expressly made confidential under other law. The requestor raises category (3) which includes "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." However, in this case, we need not determine whether the information at issue is within category (3). Because the county asserts that the information is confidential under other law, the categorization of the information for purposes of section 552.022 is not determinative of the whether the information is subject to required public disclosure.

Before we address your claim under the Privacy Rule, we must address a procedural matter. You did not timely submit to this office copies of the information at issue, or representative samples of the information, or arguments supporting your claims. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. However, you submitted to this office copies of representative samples of the information at issue and written comments stating why the information at issue is confidential on July 11, 2003. Since the judge received the request on June 12, 2003, the July 11, 2003 submission was more than fifteen business days after the judge received the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Therefore, we turn to your claims that the information at issue is confidential by law.

You claim that the submitted information is not subject to release pursuant to the Privacy Rule adopted by the United States Department of Health and Human Services, Office for Civil Rights, to implement HIPAA. Information that is deemed confidential by law is excepted from disclosure under section 552.101 of the Government Code. A federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision Nos. 599 at 5 (1992), 373 (1983)

At the direction of Congress, the Secretary of the United States Department of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records. The HHS issued these regulations as the Federal Standards for Privacy of Individually Identifiable Health Information, or the Privacy Rule. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a "covered entity" as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. 45 C.F.R. § 160.103. You state that

Ector County is self-insured with approximately 750 participants including retirees and dependants [sic]. Ector County uses a third party administrator who provides benefits evaluation and management services for other entities as well as Ector County. . . . the [P]rivacy [R]ule identifies all protected health information of the payment for health care and prohibits disclosure unless the rule permits or the subject of the information authorizes its release in writing.

You also submitted to this office highlighted copies of sections 160.102 and 160.103 of title 45 of the Code of Federal Regulations and state that "[r]ather than me advising you how Ector County is a health plan, I have highlighted the pertinent portions which should

satisfy your previous request [for an explanation of how the county is a covered entity].” You have highlighted the parts of the Privacy Rule that pertain to a “health plan” and a “group health plan.” Under section 160.103, you have highlighted the parts that state that

health plan means an individual or group plan that provides, or pays the cost of, medical care (as defined in section 2791(a)(2) of the PHS Act, 42 U.S.C. 300gg-91(a)(2)).

(1) Health plan includes the following, singly or in combination:

(i) A group health plan, as defined in this section.

...

(vii) An employee welfare benefit plan or any other arrangement that is established or maintained for the purpose of offering or providing health benefits to the employees of two or more employers.

...

(xvii) Any other individual or group plan, or combination of individual or group plans, that provides or pays for the cost of medical care (as defined in section 2791(a)(2) of the PHS Act, 42 U.S.C. 300gg-91(a)(2)).

45 C.F.R. § 160.103. You have also highlighted the definition of “group health plan”:

Group health plan . . . means an employee welfare benefit plan (as defined in section 3(1) of the Employee Retirement Income and Security Act of 1974 (ERISA), 29 U.S.C. 1002(1)), including insured and self-insured plans, to the extent that the plan provides medical care (as defined in section 2791(a)(2) of the Public Health Service Act (PHS Act), 42 U.S.C. 300gg-91(a)(2)), including items and services paid for as medical care, to employees or their dependents directly or through insurance, reimbursement, or otherwise, that:

(1) Has 50 or more participants (as defined in section 3(7) of ERISA, 29 U.S.C. 1002(7)); or

(2) Is administered by an entity other than the employer that established and maintains the plan.

Id. In addition, you submitted to this office a highlighted copy of the Ector County, Texas Flexible Benefits Plan Summary Plan Description as well as a highlighted copy of the Plan Document and Summary Plan Description for Ector County Employee Benefit Plan (the

“Plan Document”), effective October 1, 2000. The Plan Document states that the type of health plan for Ector County is a welfare benefit plan. We note that you state that 750 Ector County employees participate in the Ector County Employee Benefit Plan and that the plan is administered by a third party administrator. Thus, we understand you to represent that the Ector County Employee Benefit Plan is a covered entity because it meets the definitions of a health plan and group health plan.

Most covered entities were required to comply with the Privacy Rule beginning April 14, 2003. Some small health plans have an additional year until April 14, 2004 to come into compliance. *See* 42 U.S.C. § 1175(b). Section 160.103 of the Privacy Rule defines small health plan as a “health plan with annual receipts of \$5 million or less.” *See* 45 C.F.R. § 160.103. The Secretary of the United States Department of Health and Human Services determines the plans that qualify as small health plans. *See id.* § 1175(b)(1)(A). You have provided this office no information to allow us to conclude that the Ector County Employee Benefit Plan is not required to comply with the federal privacy standards at this time. We will therefore determine whether the requested information is protected health information under the Privacy Rule.

Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms as follows:

Health information means any information, whether oral or recorded in any form or medium, that:

- (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

- (i) That identifies the individual; or
- (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Protected health information means individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

- (i) Transmitted by electronic media;
- (ii) Maintained in electronic media;
- (iii) Transmitted or maintained in any other form or medium.

45 C.F.R. §§ 160.103, 164.501. You contend that the submitted information consists of information relating to the past, present, or future payments for the provision of health care for an individual.” The Privacy Rule defines “payment” in pertinent part as

(1) The activities undertaken by:

- (i) A health plan to obtain premiums or to determine or fulfill its responsibility for coverage and provision of benefits under the health plan; or
- (ii) A health care provider or health plan to obtain or provide reimbursement for the provision of health care; and

(2) The activities in paragraph (1) of this definition relate to the individual to whom health care is provided and include, but are not limited to:

...

- (iii) Billing, claims management, collection activities, obtaining payment under a contract for reinsurance (including stop-loss insurance and excess of loss insurance) and related health care data processing.

45 C.F.R. § 164.501. Upon review of the information, we agree that it is protected health information as contemplated by HIPAA. However, we note that a covered entity may use protected health information to create information that is not individually identifiable health information by de-identifying the information. 45 C.F.R. § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information do not apply

to information that is de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. 45 C.F.R. § 164.502(d)(2).

Under the Privacy Rule, a covered entity may determine that health information is not individually identifiable only under certain circumstances. One method requires a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable to apply and document such methods and principles to determine release of protected health information would result in a very small risk of individual identification. *See id.* § 164.514(b)(1). The other method requires the covered entity to meet the following two criteria: 1) remove specific identifiers, including but not limited to, names, dates directly related to an individual, telecommunication numbers, vehicle identifiers, and any other unique identifying number, characteristic, or code and 2) have no actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. *See id.* § 164.514(b)(2)(i), (ii). In this instance, however, the requestor is aware of the identities of the individuals whose protected health information is at issue. Therefore, we conclude that using either of the methods of de-identification described above would be insufficient to protect the individuals' identities as required under the Privacy Rule. Accordingly, we find that the submitted information in its entirety constitutes protected health information under the Privacy Rule. *See id.* § 164.514(b)(2)(ii)(R). Consequently, the county must withhold the information from disclosure based on section 552.101 of the Government Code in conjunction with the Privacy Rule.² As we are able to make this determination, we do not address your remaining claim.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.*

²We note that the Privacy Rule contains special requirements for groups health plans, group health plan documents, and group health plan use and disclosures of protected health information. *See* 45 C.F.R. § 164.504(f). For example, the Privacy Rule requires a plan sponsor to amend the plan documents to include provisions that, among other things, restrict the uses and disclosure of protected health information by the plan sponsor consistent with the requirements of subpart E of part 164 of title 45 of the Code of Federal Regulations. *See id.* The plan sponsor must also execute a certification that the plan documents have been amended to incorporate provisions concerning the use and disclosure of protected health information and that the plan sponsor agrees to not use or further disclose the information other than as required by the plan document or by law. *See id.*

§ 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

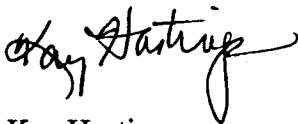
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kay Hastings".

Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 186891

Enc: Submitted documents

c: Mr. Brian Rogers
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(w/o enclosures)